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SUPREME COURT, U. S.

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No. 1034

In the

Supreme Court of the United States

OCTOBER TERM, 1968

HARPER & ROW PUBLISHERS, INC., et al.,
Petitioners,

vs.

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court
Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief in opposition is filed on behalf of the Honorable Bernard M. Decker, United States District Judge, respondent, and on behalf of all plaintiffs in the treble damage antitrust suits now pending in the District Court for the Northern District of Illinois, entitled *State of Illinois* v. *Harper & Row Publishers, Inc.*, No. 67 C 1899 and related cases.

Opinion Below

The unreported opinion of the Court of Appeals and the order entered by the District Court on July 16, 1968, are printed, in relevant part, in Appendices A and B of the Petition.

Question Presented

Whether the District Court's discovery order for the production of documents constituted a clear abuse of discretion requiring the issuance of a writ of mandamus by the Court of Appeals.

STATEMENT OF THE CASE

The petitioners have substituted the repetition of pejoratives and unfounded accusations for legal argument. Their statement of facts neglects or distorts certain crucial events in the children's books antitrust proceedings, and omits controlling admissions and concessions made on behalf of the petitioners by their spokesmen. At the outset, therefore, respondents wish to supplement and correct the record.

The Pending Treble Damage Actions

Treble damage antitrust suits have been filed by attorneys general for the States of Illinois, West Virginia, Kansas, Oregon, Washington, Hawaii, Indiana, Ohio, New York, Minnesota, Alaska, Michigan, and Texas, and by corporation counsel for the Cities of Chicago, New York, Philadelphia, St. Paul, San Francisco, San Diego, Los Angeles, and others, in federal district courts throughout the nation.[1] These suits have been brought on behalf of

[1] More than thirty-five separate suits have been filed in eight judicial districts.

the many thousands of public school districts and tax supported public libraries located in each of the respective states and municipalities.

All of these treble damage actions arise out of a federal grand jury investigation, and are based in large part on the same unlawful price fixing conspiracies charged in federal civil actions which were instituted in the Northern District of Illinois against eighteen publishers of library editions of children's books.

Federal Antitrust Proceedings

The Government's civil actions were filed in April 1967, and assigned to Judge Marovitz. The complaints charged a price fixing conspiracy resulting in high, artificial, and non-competitive price levels in the sale of children's books —largely to state and local governmental bodies.

Before hearings, on October 23, 1967, the Government and defendants filed stipulations providing for consent dismissal of the actions upon an undertaking by the publishers not to price fix for the next five years. Many of the state and municipal agencies here involved as respondents sought to intervene[2] for the purpose of:

a) objecting to the entry of consent judgments without an admission or determination of guilt; and

b) preserving the identity and integrity of documents in the possession, control, and custody of the Antitrust Division until the entry of an appropriate discovery order.

Judge Marovitz heard full argument, and before entering the consent judgments he secured agreement from

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[2] Denial of the petition to intervene was affirmed in *City of New York* v. *United States,* 390 U.S. 715 (1968).

the Government and defendants to an order impounding all documents involved until the further order of the Chief Judge of the District Court for the Northern District of Illinois. This order, entered on November 20, 1967, recites in part:

> "* * * that motions have been or may be made in these treble damage actions for the production of documents, grand jury subpoenas, and grand jury testimony presently in the possession of plaintiff; and that it is in the public interest that these documents, grand jury subpoenas, and grand jury testimony be identifiable and preserved and remain together for possible use in these treble damage actions."

The Petition to Chief Judge Campbell

Chief Judge Campbell, as supervisor of the grand jury proceedings, was then petitioned by the attorneys general of eight states and the corporation counsel of four major cities for an order permitting inspection and copying of:

a) all documents in the possession of the Antitrust Division resulting from its investigation of violations of the antitrust laws in the sale of children's books; and

b) grand jury subpoenas issued, and the names of witnesses who appeared in connection with that investigation.

The petition recited that:

1. Many treble damage actions had been filed in several judicial districts by public officials on behalf of many thousands of schools and public libraries—"based in large part on the same unlawful price-fixing conspiracies charged in the federal civil actions."

2. The Antitrust Division had possession and custody of documents secured by subpoenas or investigation which "are material, relevant and essential to prove

the price-fixing conspiracies charged in petitioners' pending treble damage actions."

3. In several treble damage actions, Rule 34 motions had already been filed seeking the production of grand jury documents for inspection and copying.

4. A single order from the Chief Judge who impaneled the grand juries "will effect uniformity in the administration of justice and certainty and simplification of procedure for a multitude of interested parties."

5. A single inspection and copying by a committee representing all of the involved public officials "will result in substantial economy of time and money for the courts, the Antitrust Division of the Department of Justice and all interested parties, including the many involved school districts and public libraries which are already heavily financially burdened."

6. Public policy as announced by Congress and emphasized by the United States Supreme Court seeks to promote and aid antitrust treble damage claimants as the "surest weapon for enforcement" of the antitrust laws.

The petition concluded that "for good cause shown by the facts stated herein" the documents should be ordered produced for inspection.

The publisher defendants filed a brief in opposition to the petition. They stated that Rule 34 motions had been filed in several related treble damage actions, but Judge Harris, of the Northern District of California, had entered stay orders "pending consideration of action by the Judicial Coordinating Committee for Multiple Litigation," and that stay orders were similarly entered by district courts in Philadelphia, Madison, and Boston. The defendants then argued:

"In an effort to justify interference with those courts' management of the pending damage actions, petitioners contend that this proceeding is an attempt to avoid 'a multiplicity' of similar Rule 34 motions in different forums, ostensibly in order to achieve 'judicial efficiency, economy and uniformity of decision'. . . . It is respectfully submitted, however, that this Court should permit the Judicial Coordinating Committee for Multiple Litigation to evaluate such contentions, inasmuch as the Judicial Conference of the United States created that Committee for precisely that purpose. The Coordinating Committee will have an opportunity to consider all of the arguments advanced by petitioners in this proceeding, as well as the arguments advanced by the other parties to the damage actions. Petitioners should not be permitted to circumvent the Coordinating Committee by conducting 'coordinated discovery' in this Court.**"

"** Petitioners attempt to support their contentions regarding 'multiplicity of discovery motions' by relying on Judge Robson's decision in *Commonwealth Edison Company* v. *Allis-Chalmers Mfg. Company*, 211 F. Supp. 729 (N.D. Ill. 1962). . . . That case, however, was one of the electrical equipment damage actions, in which all national discovery was coordinated by the Judicial Coordinating Committee—the very procedure which petitioners are now seeking to circumvent in this proceeding."

(Memorandum of Certain Publishing Companies in Opposition, dated Jan. 10, 1968, pp. 27-28)

The Department of Justice filed briefs with Chief Judge Campbell stating that it had no objection to the entry of such order as the Court deemed appropriate for the production of (i) documents procured through grand jury subpoenas, (ii) documents voluntarily submitted, and (iii) grand jury subpoenas, and that the Court had the discretionary powers to permit such inspection and copying.

During the pendency of the petition before Chief Judge Campbell, hearings were held in Kansas City on April 19, 1968, before a judicial panel of eight district judges, pursuant to notices served on all parties involved in the related children's books antitrust proceedings. On the basis of the determinations made at the Kansas City hearing, Judge Robson, acting on behalf of Chief Judge Campbell, entered an order on June 27, 1968, denying the petition without prejudice to its renewal. Judge Robson's ruling did not constitute a rejection of the relief sought in the petition. On the contrary, the order assumed that plaintiffs were entitled to inspect the documents subpoenaed by the grand jury. Judge Robson simply deferred to the contemplated discovery action of the judges at Kansas City. The order described the hearings in Kansas City at length, and then emphasized:

> "Among other discovery requests which were presented at the hearing on April 19, 1968, was the request for discovery of the documents submitted to the Grand Juries in this district in connection with investigations mentioned in the petition. With the approval of all the judges in attendance at the hearing, a ruling was made from the bench that the Grand Jury documents mentioned in the petition be produced by the defendants in the treble damage cases for inspection and copying. These discovery requests were granted after a finding of good cause and with an announcement that precautions would be taken in the order of production to protect documents which were privileged and immune from discovery. Orders are in the course of preparation for the implementation of these civil discovery rulings." (pp. 10-11).

The Coordinating Committee On Multiple Litigation

The district judges before whom related children's books antitrust cases had been instituted met informally in

December 1967 and January 1968 with representatives of the Coordinating Committee on Multiple Litigation to evolve coordinated discovery procedures for this multitude of actions. In February and March, 1968, the treble damage judges separately issued memoranda regarding proposals for a national discovery program and requesting suggestions of all concerned counsel.

On or about April 1, 1968, Judge Decker and the other treble damage judges notified all counsel that upon the recommendation of the Coordinating Committee a hearing would be held in Kansas City on April 19, 1968, to consider arguments on various national discovery issues, including:

> "The requests of the parties * * * for orders for production of documents."

The notification stated that "all judges before whom children's books anti-trust cases are pending have been invited to attend." Indeed, the judicial panel that met in Kansas City included Judges Harris (N.D. Cal.), Templar (D. Kan.), Clary (E.D. Pa.), Caffrey (D. Mass.), and Doyle (W.D. Wis.), before whom treble damage actions were pending. Judge Will represented the Northern District of Illinois.

At the April 19th argument, lead counsel for plaintiffs (Mr. Freeman), in reference to pending motions for production of documents, advised the judicial panel that a petition for production of documents had been completely briefed and awaited decision by Chief Judge Campbell. Mr. Freeman pointed out that the petition sought much broader production than could be granted by a single treble damage judge on a Rule 34 motion, since it included a request for the production of documents voluntarily submitted and documents subpoenaed from non-defendants.

Plaintiffs asked for a delay of the judicial panel's determination as to a production order until Chief Judge Campbell ruled (Tr. 11-15).

The panel, however, did not accept this suggestion. The issue of document production was pursued, and the publisher defendants argued at great length that, while Rule 34 motions were on file, an adequate showing of good cause had not been made:

> "[MR. MILLSTEIN] * * * Your Honor, there is one last point I would like to make, and that is on the question of the Grand Jury documents. We did not believe that the Rule 34 motion, which is being presently contended for, was within the scope of the court's order. Now it might be. We thought that the only discovery we were talking about was discovery with respect to the location of witnesses and the location of documents. They know where some documents are. They don't need that discovery.
>
> * * *
>
> "MR. MILLSTEIN: Well, Your Honor, we feel very strongly that there should be no wholesale access granted to the Grand Jury documents. We would appreciate the opportunity, of course, of arguing this at length at some date after Judge Campbell has ruled. The matter is now sub judicata before Judge Campbell. It was placed there by the plaintiffs themselves. It is most difficult for us to come before this court and argue it all over again when we know the matter is pending before Judge Campbell. But, if Your Honors want argument today on the question of the Rule 34 motion we are prepared to reach that point.
>
> "JUDGE BECKER: Well, we are giving consideration to motions for production of copies of the Grand Jury documents insofar as they are relevant to this

case and relate to the first wave of discovery and are either admissible in evidence or calculated to lead to the discovery of admissible evidence. * * *

"MR. MILLSTEIN: * * * Speaking for the parties to the proceeding we don't think a Rule 34 motion just directed to access of all Grand Jury documents fits the good cause requirement of Rule 34. And, we also believe that it violates the principle of Grand Jury secrecy. As far as good cause and Rule 34 is concerned, that is not simply a make-way piece of language in Rule 34. It has been held to be the required designation. And, to come before Your Honors and say, 'Give me access to all Grand Jury documents,' is hardly the type of good cause or designation which we think is called for by the cases. It is a fishing expedition, and under Rule 34 a fishing expedition, as distinguished from 26, is not permitted.

* * *

"MR. MILLSTEIN: What we are saying is this, when the plaintiffs come in and ask for all Grand Jury documents, they are supposedly in a position to state that these are material and relevant to the proceeding. How could they know that? They can't particularize. There is no way for them to know what is relevant to the proceeding. Your Honor, the correct way to get these documents is to serve the type of interrogatory which was served in plaintiffs' case in Philadelphia, namely one designed to locate witnesses and documents. And then serve a Rule 34 motion for the documents pointed out in the responses to those interrogatories. Your Honor—

"JUDGE BECKER: You see, the type of order we ordinarily enter in this is what I described to Mr. Freeman, and that is that if the documents are produced, provisions are made for motions for protective orders and for depositing with confidential designation, and these matters can be ruled upon at that time.

This is the first time in a multiple district proceeding that anyone has contended that the Grand Jury documents which resulted in an investigation that resulted in either a conviction or a consent decree were not relevant to the charges made in the Government's complaint.

"MR. MILLSTEIN: I am contending Your Honor, that they don't know whether they are relevant or not, and they don't know what the Grand Jury documents are—

"JUDGE BECKER: From what you say, they would never be able to find out.

* * *

"MR. MILLSTEIN: Well, I think the disclosure of Grand Jury documents for the purpose of impeaching witnesses and the like, I am not contending that, but what I am talking about is get Grand Jury documents pursuant to a Rule 34 motion. And, there, Your Honor, we respectfully submit that calling for it in that manner does violate Grand Jury secrecy, does not comport with the good cause requirements of Rule 34. And, that is our position on the Grand Jury documents. We think that documents should be obtained through the ordinary means. There are available means to achieve them. There are written interrogatories. * * *" (Tr. 47-52)

A full opportunity to be heard on the good cause issue was afforded. The judicial panel then recessed to consider the papers and arguments presented to it.

After the recess, Judge Becker announced the decisions reached by the Coordinating Committee and "the judges attending before whom cases are pending." (Tr. 78) With respect to the issue of doocument production, Judge Becker stated:

"Now, with respect to Grand Jury documents, it is the concensus of the judges here that discovery of Grand Jury documents at this time from parties should be recommended, that subject to the disposition and orders, which may be made by Chief Judge Campbell in Chicago, that the parties defendant will be required to produce for inspection and copying the Grand Jury documents in the Government's case which led to the Government's case in Chicago.

"We will recommend that on the basis of the information available in the files and records of these cases, and the information of the companion Government litigation, of which we may take judicial notice, that the judges consider making a finding of good cause, which is necessary under Rule 34, for the production of these documents.

"We will further recommend the protective orders, which were incorporated in the electrical equipment antitrust orders, both with respect to privilege and to confidential information.

* * *

"In addition to the Grand Jury documents for a time period from January 1st, 1959, to April 18, 1967, we will recommend that the defendants be required to produce the documents described in greater detail in the Rule 34 motion in Philadelphia, and perhaps in California, I am not sure, but I will refer to the Philadelphia motion, to include the price lists, including the catalogs, multipliers, adders and pricing rules and conditions, and term of sale, which existed during the period I have outlined, from January 1, 1959, to April 18, 1967, and that in addition the defendants be required to produce in the same manner as the Grand Jury documents, and the price information documents, the expense accounts of officers and employees with pricing authority, and their immediate assistants." (Tr. 80-82)

On May 14, 1968, the publisher defendants submitted a proposed order embodying the judicial panel's determinations, with the suggestion that the order be issued by each treble damage judge under a rule to show cause why the order should not be entered. With respect to document production the publisher defendants proposed:

"DOCUMENTS TO BE PRODUCED

On or before the day of 1968, each defendant shall produce for inspection and copying the following:

1. Those of its grand jury documents which led to the Government's case against such defendant filed on April 18, 1967 in the United States District Court for the Northern District of Illinois, good cause for ordering the production of such documents appearing from the files and records herein and from the information of the companion Government litigation.

2. A copy of each price list, price book, price catalogue or price sheet setting forth prices, discounts, adders, multipliers, pricing rules, formulae or policies, price adjustment clauses or terms and conditions of sale, including additions, insertions, supplements and changes therein, issued or maintained by such defendant for library editions of children's books during the period January 1, 1959 through April 18, 1967.

3. A copy of each expense account applicable to any period of time between January 1, 1959 and April 18, 1967 for the defendant's officer or employee having authority for pricing library editions of children's books and for his immediate assistant."

The publisher defendants submitted their proposed order with a ten-page letter of comments, which stated in pertinent part:

"12. *Production of Documents by Defendants Pursuant to Rule 34 (Plaintiffs' Part C-9)*

Defendants respectfully submit that their proposed order reflects the categories of documents which the Co-ordinating Committee suggested be produced in each District. Defendants' order is patterned after the Rule 34 motion filed in the Northern District of California covering the exact categories of documents enumerated by the Committee,—the grand jury documents which led to the Government's cases, as well as 'price lists, including the catalogs, multipliers, adders and pricing rules and conditions and terms of sale,' and certain expense accounts (Trans. p. 82)."

(Letter of May 14, 1968, to Coordinating Committee, p. 8)

The publisher defendants transmitted three lengthy letters of comments (May 14, May 22, and May 23).[3] At no point did they express doubt that Rule 34 motions were properly before the Coordinating Committee for consideration, voice dissatisfaction with the judicial proceedings in Kansas City, or contend that they had not had an adequate opportunity to be heard on the good cause issue. Their comments were confined to an attempt to limit the scope, but not the categories, of the documents to be produced.[4]

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[3] The wholesaler defendants submitted written comments as well.

[4] Of course, the defendants indicated that they did not waive the right to object to any order entered by the individual damage judges to whom the Coordinating Committee's recommendations were to be directed. As stated in their May 22nd comments: "Obviously any party is free to make whatever argument it wishes in any action to which it is a party. But plaintiffs' assertion that they 'understand defendants want the unfettered opportunity to again argue the very issues that were debated in Kansas City' is wholly without foundation."

The Coordinating Committee adopted the show cause form of order suggested by the defendants which it circulated to the various treble damage judges with its recommendations.

Proceedings Before Judge Decker

Judge Decker then distributed the recommended order, entitled proposed National Pretrial Order No. 1, to all parties involved in the treble damage actions in the Northern District of Illinois, with a request that they show cause why the order should not be entered. This order contained a proposed finding of "good cause" for the production of documents, including documents furnished by the defendants in response to grand jury subpoenas.

On July 11, 1968, Judge Decker conducted a pre-trial hearing, heard arguments and called for written suggestions of modifications to the proposed order. On July 16, 1968, Judge Decker entered the order in the cases pending before him, with several changes suggested by defendants.

The petitioners-defendants had ample opportunity at that time to contest the proposed finding of good cause and to attack the procedures which led to the order for document production.[5] Instead, the publisher and wholesaler defendants sought to have the entry of the order postponed until after the statutorily created Judicial Panel transferred the multiple cases to a single judge for coordinated discovery pursuant to Section 1407.[6] The

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[5] Defendant Random House stated that it had no objection to the entry of the order.

[6] Following enactment of Section 1407 on April 29, 1968, the Chief Justice of the United States Supreme Court appointed Judges Murrah, Wisdom, Robson, Becker, Lord, Weinfield, and Weigel to the Judicial Panel on Multidistrict Litigation.

reason for changed tactics was obvious, since by this time, National Pretrial Order No. 1 had already been entered by Judge Templar in Kansas, Judge Caffrey in Massachusetts, and Judge Harris in California.

On October 17, 1968, the Judicial Panel transferred all children's books cases to Judge Decker in the Northern District of Illinois. One of the reasons stated for selecting the transferee site was that:

> "the grand jury documents relating to the actions are in Chicago. Many of the plaintiffs * * * applied to the district court for release of documents subpoenaed in connection with the grand jury's investigation * * *."[1]

On December 6, 1968, Judge Decker, now acting as coordinating judge under the Section 1407 transfer, heard arguments by and received a brief from defendants-petitioners in support of a motion to stay the production of grand jury documents on the ground that the "facts" of good cause had not been demonstrated.

On December 13, 1968, Judge Decker re-affirmed his findings in National Pretrial Order No. 1 that good cause existed for the production of documents, stating:

> "Section 7(a) of National Pretrial Order No. 1 is hereby supplemented as follows:
>
> 'For good cause appearing, each plaintiff may, on or after December 16, 1968, inspect and copy the documents described in exhibit E which are now in the custody of the antitrust division of the Justice Department. These documents shall

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[1] *In re Multidistrict Treble Damage Litigation Involving Library Editions of Children's Books*, 1968 CCH Trade Reg. Rep. ¶ 72,665.

> be subject to the same restrictions which are outlined in section 7(b). Defendants may claim confidentiality and privilege by filing a list of such restricted documents with the clerk of the court * * *.
>
> "Finally, defendants' motion for a stay of section 7 of this court's July 16, 1968 order, as amended by the preceding paragraphs, is denied. The question of 'good cause' was fully considered by (1) the Coordinating Committee for Multidistrict Litigation, which held a hearing in Kansas City on April 19, 1968, and (2) this court, both prior to its July 16, 1968, ruling and again on December 6, 1968, when defendants' motion was briefed and reargued."

Thereupon, the petitioners sought a writ of mandamus in the Court of Appeals for the Seventh Circuit to compel Judge Decker "to vacate paragraph (7) and Exhibit E of his order dated July 16, 1968, known as National Pretrial Order No. 1, together with his supplementing order of December 13, 1968." The issues were extensively briefed by the respective parties. Upon full consideration, the Court of Appeals unanimously denied the petition.

ARGUMENT

The petitioners have asserted no basis whatsoever to invoke the extraordinary writ of mandamus. No amount of sophistry or invective can disguise the fact that the only issue presented to this Court is whether the District Court properly exercised its discretion to order the production of relevant documents. Mandamus is clearly an inappropriate avenue to attack such a ruling.

Moreover, the arguments advanced by petitioners fall beneath the weight of their factual misrepresentations. Throughout these extended and consolidated proceedings the defendants were given repeated opportunities to argue the issue of good cause—and availed themselves of these opportunities to contend vigorously, albeit unsuccessfully, that production of documents should not be ordered. This latest effort to frustrate and delay discovery is an imposition upon this Court that should be summarily rejected.

I. MANDAMUS WILL NOT LIE TO REVIEW A DISTRICT COURT'S FINDING OF GOOD CAUSE IN A DISCOVERY ORDER FOR THE PRODUCTION OF DOCUMENTS

It should be noted that petitioners have not proceeded with sufficient diligence in this action. The discovery order now attacked was initially entered by Judge Decker on July 16, 1968, in his capacity as an individual treble damage judge. Under these circumstances, there is authority for dismissal of the petition for writ of mandamus as not timely filed, since the designated period to appeal or

challenge that ruling has long since expired. *In re United Shoe Machinery Corp.*, 276 F.2d 77, 79 (1st Cir. 1960).[8]

The sole issue presented by this case, if timely, is whether the District Court so clearly abused its broad discretion as to pretrial discovery that a writ of mandamus should issue to vacate its order for production of documents. Before the Court of Appeals, petitioners asserted no basis whatsoever to invoke the extraordinary writ of mandamus. Their petition for certiorari quite surprisingly, but significantly, fails to discuss this issue.

It has been consistently held that mandamus will not lie to review a trial court's discovery order unless the aggrieved party shows a clear abuse of discretion and establishes an indisputable right to such drastic relief. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953); *Texas Gulf Sulfur Co.* v. *Ritter*, 371 F.2d 145, 146-147 (10th Cir. 1967). This doctrine was most recently expressed in *Will* v. *United States*, 389 U.S. 90 (1967), wherein this Court unanimously reversed the issuance of a writ of mandamus directed against a trial court's discovery order. The opinion stressed that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify invocation of this extraordinary remedy," and cautioned that:

> "Courts faced with petitions for the peremptory writ must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of non-

[8] The petitioners' claim that this case raises problems as to administration of litigation under Section 1407 simply ignores the fact that Judge Decker ordered the production of documents in the individual treble damage actions pending before him—prior to any transfer and consolidation under Section 1407.

> appealable orders on the mere ground that they may be erroneous. 'Certainly Congress knew that some interlocutory orders might be erroneous when it chose to make them nonreviewable.'" At 95, 98, n. 6.

The power to grant the peremptory writ of mandamus is discretionary with the Court of Appeals, *Roche* v. *Evaporated Milk Ass'n,* 319 U.S. 21, 25-26 (1943), and such authority has been used sparingly, especially with respect to rulings upon discovery issues entrusted to the discretion of the trial judge. Thus, courts of appeals have consistently denied petitions for writ of mandamus to review a finding of good cause for the production of documents. *E.g., United States* v. *Hughes,* 388 F.2d 236, 239 (5th Cir. 1968); *Paramount Film Distributing Corp.* v. *Civic Center Theatre,* 333 F.2d 358 (10th Cir. 1964); *American Express Warehousing, Ltd.* v. *Transamerica Ins. Co.,* 380 F.2d 277, 284 (2d Cir. 1967); *In re Illinois Central R.R.,* 192 F.2d 465 (5th Cir. 1951) (writ of prohibition); *Keaton* v. *Kennamer,* 42 F.2d 814 (10th Cir. 1930).[9]

The petitioners have not questioned the judicial power to enter the discovery order, nor charged usurpation of that power. They claim rather that insufficient factual basis existed to support the discovery order, and anchor their expletory contentions upon the premise that manda-

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[9] The petitioners misplace reliance on *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964). That case involved the appropriateness of a Rule 35 order of "first impression" upon "a substantial allegation of usurpation of power." Moreover, that decision expressly reaffirmed the rule: "that in the ordinary situation where the sole issue presented is the district court's determination that 'good cause' has been shown for an examination, mandamus is not an appropriate remedy, absent, of course, a clear abuse of discretion." At 111.

mus must necessarily issue because the District Court allegedly weighed one factor more heavily than another to determine that good cause had been shown. This "argument is transparently inaccurate." *Pennsylvania R.R.* v. *Kirkpatrick,* 203 F.2d 149, 150 (3d Cir. 1953); See *Parr* v. *United States,* 351 U.S. 531, 520 (1956). The finding of good cause and consequent order to produce documents are matters of judgment and discretion. The exercise of this discretion cannot be reviewed piecemeal through mandamus proceedings. *Bank Line, Ltd.* v. *United States,* 163 F.2d 133 (2d Cir. 1947).

II. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO ORDER THE LIMITED PRODUCTION OF DOCUMENTS BY DEFENDANTS INCLUDING THOSE SUBPOENAED IN THE COURSE OF A NARROWLY DEFINED INVESTIGATION BY THE ANTITRUST DIVISION OF THE DEPARTMENT OF JUSTICE

Petitioners object to National Pretrial Order No. 1 insofar as it requires document production. This is nothing more than an attack upon the exercise of discretion by the trial judge and cannot be the basis of a petition for a writ of mandamus. However, in view of the petition's incomplete and distorted recitation of the proceedings below, this brief will discuss the total lack of substance in each contention made by petitioners.

A. Motions to Produce Documents Were Properly Before the Court and Defendants Had Abundant Opportunity to be Heard

The petitioners base their request for extraordinary relief upon the disingenuous contention that an adequate opportunity to be heard on the good cause issue was not afforded them and that there was insufficient factual basis

for the trial court to order production of documents subpoenaed by the grand jury.

In several related children's books cases, Rule 34 motions were filed supported by affidavits showing good cause for the production of the categories of documents now at issue. In addition, a petition for production of documents procured through grand jury subpoenas, among others, was filed by the treble damage claimants in *In re Grand Jury Proceedings,* 66 G.J. 3003 (N.D. Ill.), which contained specific allegations of fact supporting a good cause showing. Rulings on those motions were deferred in the face of a developing program by the Coordinating Committee on Multiple Litigation for simplified and unified discovery procedures.

The Coordinating Committee on Multiple Litigation, with most of the judges before whom treble damage actions were pending, heard arguments of all parties with respect to several discovery issues upon which a national coordinated program was sought. The pending motions to produce documents in the children's books cases were embodied in the notice of this hearing and were fully considered by the assembled judicial panel. Indeed, counsel for the publisher defendants argued at great length about the adequacy of "the Rule 34 motion, which is being presently contended for."

The Coordinating Committee thereafter found "good cause" and recommended to the individual judges that good cause findings be made in the treble damage proceedings as part of an order requiring the production of the involved documents for inspection. In this regard, petitioners submitted a draft order which in effect conceded that a motion to produce documents had been adequately presented, argued and considered, and that the

Coordinating Committee had at least preliminarily found good cause. Petitioners suggested to the Coordinating Committee a form of order that the various treble damage judges could issue on a rule to show cause why a Rule 34 production order should not be entered.

This was the procedure followed by Judge Decker during July 1968, when acting as an individual damage judge. He proposed National Pretrial Order No. 1 and asked for comments, suggestions, and arguments of counsel. Thus, petitioners again had a full opportunity to contest and be heard on every aspect of the proposed order, including the finding of good cause for the production of documents described in Exhibit E. Judge Decker considered the oral and written arguments submitted by the parties, and entered National Pretrial Order No. 1 on July 16th, with some of the amendments suggested by the defendants, requiring the production of documents for inspection by December 15, 1968.[10]

On December 6, 1968, after Judge Decker had been designated to coordinate all the related children's books antitrust cases, petitioners once again presented oral and written arguments in opposition to the document production portion of the order. Upon consideration of these renewed objections, Judge Decker on December 13, 1968, reaffirmed his finding of good cause and his direction to produce documents for inspection.

These procedures fully complied with the essential requirements of the Federal Rules of Civil Procedure. It is not essential that a motion be formally designated a "Rule 34 Motion" where all parties understand that document

[10] The failure of petitioners to make timely attack upon entry of this order underscores the utter lack of merit in their present posture.

production is requested. In fact, such a motion may be presented orally in the course of a hearing or at trial. *Jones* v. *Uris Sales Corp.*, 373 F.2d 644, 647 (2d Cir. 1967).

In the present case, more than adequate notification of plaintiffs' motion to produce documents was provided by the Rule 34 motions in several of the related cases, by the petition to produce documents for inspection, filed by the treble damage claimants before Chief Judge Campbell, by the notice of the Coordinating Committee hearing of April 19, 1968, and by Judge Decker's rule to show cause why National Pretrial Order No. 1 should not be entered.

The petitioners used the many opportunities to present their position. They filed extensive briefs in opposition to the petition to produce documents before Chief Judge Campbell; made arguments before the Coordinating Committee, supported by extensive written comments; submitted suggestions in response to the show cause order issued by Judge Decker prior to entry of National Pretrial Order No. 1 on July 16, 1968; and reargued the issue before Judge Decker on December 6, 1968, upon submission of yet another brief.

B. The "Factual Basis" for a Finding of Good Cause

Without any proffer of the arguments they wish to present to Judge Decker to contravene the showing of good cause already made, petitioners belatedly demand an evidentiary hearing at which the treble damage plaintiffs would be required to prove special circumstances making necessary the production of the documents subpoenaed by the grand jury, as well as other documents enumerated in Exhibit E of National Pretrial Order No. 1. This position, to say the least, is archaic and incompatible with the well accepted and repeatedly utilized liberal discovery procedures.

No evidentiary hearing on the question of good cause is required by the federal rules. A trial judge has broad discretion as to how a showing of good cause may be made. As stressed in *Schlagenhauf* v. *Holder*, 379 U.S. 104, 119 (1964), "good cause" in terms of Rule 35:

> "* * * does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination. Nor does it mean that an evidentiary hearing is required in all cases. This may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing. It does mean, though, that the movant must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule.
>
> "Of course, there are situations where the pleadings alone are sufficient to meet these requirements."

In these proceedings, good cause was abundantly demonstrated by the pleadings, affidavits, arguments, and briefs before the treble damage judges, Chief Judge Campbell, and the judicial panel. The factors enumerated by plaintiffs in the record before the District Court fully support the order for production of documents. *Connecticut Mutual Life Insurance Co.* v. *Shields*, 17 F.R.D. 277 (S.D. N.Y. 1955).

Consent decrees had been entered in federal civil proceedings charging price-fixing conspiracies involving library editions of children's books. The allegations in the treble damage actions were similar to the civil complaints, with the addition of certain wholesalers of the

price-fixed books as defendants.[11] The documents subpoenaed from the defendants in the course of an investigation confined to the illegal behavior charged in both the civil complaints and treble damage actions are certainly relevant to proof of the alleged conspiracy or reasonably calculated to lead to the discovery of such evidence. See *Bank Line, Ltd.* v. *United States*, *supra* at 136.

A multitude of treble damage actions are pending in various judicial districts. "The very magnitude alone of this related litigation * * * cries out for all possible simplification and unification of procedures." *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 211 F. Supp. 729, 734 (N.D. Ill. 1962). A solemn duty is imposed upon the judge in complex multidistrict litigation to institute and enforce efficient procedures. Thus, the *Manual for Complex and Multidistrict Litigation* issued by the Coordinating Committee on Multiple Litigation provides:

> "The trial court has the undoubted power and inescapable duty to control the processing of a case

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[11] Contrary to the insinuation of petitioners, the fact that the grand jury proceeding did not result in indictments is no impediment to the subsequent utilization of grand jury documents in furtherance of the civil actions—since the grand jury proceedings were not tainted by misuse, abuse and bad faith. *United States* v. *Proctor & Gamble Co.*, 356 U.S. 677, 683-684 (1958).

The petitioners further seek to create the misimpression that National Pretrial Order No. 1 requires production of documents which may be irrelevant by lifting the remarks of plaintiffs' liaison counsel out of context. (Petition, p. 23) As stressed in argument by plaintiffs to the Judicial Panel in Kansas City, the petition before Chief Judge Campbell sought far broader production than what the Coordinating Committee recommended and Judge Decker ordered, in that plaintiffs requested documents voluntarily submitted and documents secured from non-defendants.

from the time it is filed. In the complex case the court must assume an active role in managing all steps of the proceedings." (p. 15).

It does not require lengthy argument to show the urgent need for efficient, simplified procedure in cases of the magnitude of the proceedings before Judge Decker. The order now attacked was originally entered by Judge Decker in the individual treble damage actions pending before him; then reaffirmed and implemented after the related antitrust litigation had been transferred to him for coordination of pretrial discovery. While in the ordinary two or three party litigation it is possible to require a party to conduct depositions or other discovery proceedings in order to establish a foundation for its Rule 34 motion, such a procedure applied to complex litigation, as here, would result in chaos. If interrogatories or depositions were required first steps, resolution of this case would be delayed for many years.[12]

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[12] Nothing in any of the cases cited by petitioners regarding the elements necessary to show "good cause" militates against the entry of the document production order here attacked. All were relatively simple and straightforward situations where the party seeking production had the resources to obtain the information sought by readily alternative means. In *Hauger* v. *Chicago R.I. & P.R.R.*, 216 F.2d 501, 508 (7th Cir. 1954), a personal injury plaintiff asked for production of witness' statements taken by defendant's attorneys. Finding that all the witnesses were alive and had been made available to plaintiff for depositions, the court held that "the rights of a litigant in the work-product of his lawyers and agents are not required to give way to an adversary's right of discovery." The same result was reached in *Guilford National Bank* v. *Southern Ry.*, 297 F.2d 921 (4th Cir. 1962) (good cause showing requirement specifically limited to written statements of witnesses).

Moreover, there is no justification for imposing this type of burden on the judicial apparatus. As stressed below by the treble damage plaintiffs, documents which are relevant, material, and essential to the establishment of the alleged price-fixing conspiracy have been assembled as a result of federal investigation into the same matter, and impounded in the custody of the Antitrust Division. Since these documents have been collected in a central location, their release for inspection poses no burden or expense to petitioners.[13] Thus, petitioners will be far less inconvenienced by a production order than by being required to submit vast numbers of their employees to depositions. They can only hope to frustrate, delay, and exhaust plaintiffs. No court can countenance such tactics. In addition, no prejudice will result to defendants because of the inclusive protective order entered by Judge Decker in connection with his production order. Finally, by providing plaintiffs with these documents at an early stage of the litigation, the deposition program can be more realistically shaped and the possibilities of terminating this litigation short of twenty or thirty trials will be immeasurably enhanced. The fact that similar production orders have been entered in the early stages of almost all consolidated or coordinated proceedings to date attests to the efficacy and justice of this mode of procedure.[14]

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[13] Of course, this eliminates one of the primary reasons for the technical requirements of Rule 34.

[14] It has become standard procedure for district courts, in treble damage cases brought by public agencies claiming overcharges on price-fixing commodities, to permit access to documents previously subpoenaed by a grand jury at the earliest stages of discovery. This occurred in the following antitrust suits: *Illinois* v. *Pennsalt Chemical,* No. 46550 and related cases (N.D. Cal., Boldt, J., March 17, 1967) (*Chlor-alkali*); *Illinois Public Service Co.* v. *Aluminum Co. of America,* No. 65 C 1643 (N.D. Ill.,

The pending treble damage actions were brought on behalf of school districts and tax supported libraries victimized by the alleged price fixing conspiracies. The plaintiffs are "charged with the duty to protect wide-reaching public interests." *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 486, 489 (E.D. Pa. 1962). These circumstances intensify the strong public policy to support enforcement of the antitrust laws by treble damage claimants. Such policy, though derided by petitioners, has relevance to a judicial determination whether to order production of documents.[15]

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[14] (Continued)
Robson, J., Dec. 12, 1965) (*Aluminum Cable*); *Chicago Transit Authority* v. *United States Steel Corp.*, No. 66 C 1487 (N.D. Ill., Perry, J., August and Sept. 1967) (*Steel Wheels*); *Illinois* v. *Brunswick Corp.*, No. 62 C 451 (N.D. Ill., Tehan, J., Nov. 1, 1962) (*Folding Gymnasium Bleachers*); *Illinois* v. *Sperry Rand Corp.*, No. 65 C 1549 and related cases (N.D. Ill., Will, J., Feb. 25, 1965) (*Library Shelving*); *Eastland Construction Co.* v. *American Radiator & Standard Sanitary Corp.*, No. 46162 and related cases (N.D. Cal., July 30, 1968) (*Plumbing*) (order entered after argument before Judge Harris on June 26, 1968, as to propriety of discovery motion).

[15] As Professor Moore points out with respect to the requirement of a good cause showing for document production:

> "In short, any showing that failure to order production would unduly prejudice the preparation of the party's case, or cause him hardship or injustice, will support the order. * * *
>
> "In case of business records, this two-factor test, relevancy plus need, often resolves itself into a question of simply relevancy, for the exclusive possession of the information through which the claim or defense must be established is so plain as to make the requirement of a showing little more than a requirement of a recitation. * * * [I]n this sort of case the usual

In short, these factors overwhelmingly established good cause. These matters were fully considered by the trial court, petitioners were apprised of the reasons advanced for the production of documents, and took several of the opportunities afforded them to argue these issues, both orally and with extensive briefs. Even at this late stage in the proceedings, petitioners have not indicated anything else they can say which would defeat the showing of good cause.[16]

C. The Document Production Raises No Issue of Grand Jury Secrecy

Upon request of the plaintiffs in consolidated treble damage actions, and "for good cause appearing," the District Court authorized the inspection and copying of documents in the custody of the Antitrust Division which are material, relevant, and essential to prove the alleged price fixing conspiracy. Such inspection is unrelated to whether these documents were presented to any grand jury

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[15] (Continued)

alternative to production of particular documents is the task of answering searching interrogatories; the information, then, must be made available in any event, and the question is one of who will pay for assembling and collating it." 4 *Moore's Federal Practice* (2d ed. 1968), ¶ 34.08, pp. 2476-2482.

[16] Petitioners contend that Exhibit E (Appendix B to the Petition) constitutes "wholesale" production of documents, and that such an order must be preceded by interrogatories and depositions seeking identification of the documents which then may be more specifically identified in another motion to produce. The treble damage plaintiffs submit that the specification in the original motions, and consequent order, was adequate under any circumstance. 4 *Moore's Federal Practice,* (2d ed. 1968), ¶ 34.07.

or used by the Government for any other purpose. The plaintiffs have sought and been given access to the subpoenaed documents for their intrinsic value in the treble damage actions, rather than to learn what occurred before the grand jury. It has been uniformly held that production of such documents for their own sake does not intrude upon the secrecy of grand jury proceedings.[17]

These guiding principles are authoritatively expressed in *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir. 1960). In affirming an order which permitted the Interstate Commerce Commission to inspect records subpoenaed by a federal grand jury, the Court of Appeals stated:

> "[T]he Rule [6(e) of the Federal Rules of Civil Procedure] is intended only to protect against disclosure of what is said or what takes place in the grand jury room. Documents as well as oral testimony of course may come within its proscription against disclosure. * * * However, it is not the purpose of the Rule to foreclose from all future revelation to

[17] The cases relied upon by petitioners may be readily distinguished since they involve disclosure of testimony given before grand juries. The disclosure of verbatim accounts of grand jury proceedings raises issues far beyond the confines of the present case. Moreover, *Application of State of California*, 195 F. Supp. 37, 39 (E.D. Pa. 1961), is not remotely relevant because the applicants there sought grand jury materials "*before* institution of suits," *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co., supra* at 736, and before it was certain that the grand jury investigation had concluded. In *United States* v. *Becton, Dickinson & Co.*, 30 F.R.D. 132 (D. N.J. 1962), defendants in a government civil action sought production of all grand jury documents without designating the scope of the grand jury investigation. Here the government has no objection to inspection of the documents.

proper authorities the same information or documents which were presented to the grand jury. Thus, when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury. * * *

"In the present case the inspection sought by the ICC will in no way impinge upon the secrecy of the grand jury's deliberations. The representatives of the ICC do not seek to learn what use the grand jury has made of appellant's records. They wish only to inspect and copy the records, which happen to be in the control of the grand jury, for their own lawfully authorized investigation. No question of the 'disclosure of matters occurring before the grand jury' is therefore involved and Rule 6(e) does not prohibit the examination."

This holding has been consistently applied. In *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.,* 211 F. Supp. 729, 734 (N.D. Ill. 1962), Judge Robson ordered the production of documents produced before a federal grand jury, copies of subpoenas and lists of documents furnished the Government, and stated:

"When the document sought is sought for itself independently rather than because it was displayed to the grand jury, there is no bar of secrecy."

The same view was expressed in *In re Hearings before the Committee on Banking and Currency of the United States Senate,* 19 F.R.D. 410, 412-13 (N.D. Ill. 1956), and *In the Matter of Grand Jury Proceedings* (General Dynamics Corp.), 1961 Trade Cases, ¶70,027 (S.D.N.Y. 1961). These decisions leave no doubt as to the trial court's

discretionary power to order production of documents previously subpoenaed by a grand jury.[18]

There is simply no basis for defendants to insist upon a showing of "compelling necessity" or "particularized need." These standards relate only to the disclosure of grand jury testimony or proceedings, something that has not been requested.[19]

The documents sought from petitioners are simply and plainly the documents prepared or received by them in the ordinary course of business. The only connection between these documents and a grand jury is that copies of them were produced in response to a subpoena issued by a grand jury. These documents gained no immunity from further production by having once been produced in response to a grand jury subpoena.

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[18] The petitioners misplace reliance upon *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956), *grant of certiorari vacated and rev'd on other grounds, United States* v. *Shotwell Mfg. Co.*, 355 U.S. 233 (1957). That holding rests entirely upon the abuse and perversion of the normal functions of the grand jury, and has been so limited by numerous subsequent decisions. *E.g., United States* v. *Morton Salt Co.*, 216 F. Supp. 250, 254 (D. Minn. 1962); *United States* v. *General Electric Co.*, 209 F. Supp. 197, 200-201 (E.D. Pa. 1962).

[19] Even were these standards pertinent, there is ample authority for the disclosure of grand jury testimony to further discovery in complex antitrust litigation. *E.g., Atlantic City Electric Co.* v. *A. B. Chance Co.*, 313 F.2d 431 (2d Cir.), *stay denied*, 83 S.Ct. 964 (1963); *Nairn* v. *Cleary*, 312 F.2d 748 (3d Cir. 1963). See *Dennis* v. *United States*, 384 U.S. 855, 868-870 (1966).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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